THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Op. No. 2016-UP-052
(S.C. Ct.App. filed February 3, 2016)

Randall M. Green and Ann Green, ... Respondents-Petitioners,

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C., ... Petitioners-Respondents.

PETITIONERS-RESPONDENTS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. The trial court erred in failing to find the rule of law from *Graham v. Whitaker* was applicable and in failing to find that the at-fault driver was legally liable for all of the damages awarded by the jury against Dr. Bauerle, including the spinal paralysis, the consequential damages and the loss of consortium.

In *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), this Court ruled that "the negligence of an attending physician is reasonably foreseeable." 321 S.E.2d at 44. This Court further explained that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Id. See also*, *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Accordingly, South Carolina law provides that where the original accident resulted in injuries that required medical care and the medical care as provided results in additional injuries, the original tortfeasor is liable *for all of the injuries* as a matter of law. Under this rule of law, the malpractice committed by the medical providers in treating the original injuries is reasonably foreseeable as a matter of

law, and as a result, the malpractice cannot serve as an intervening act or cause that breaks the causal chain.

In the trial court, Judge Steven John erred in rejecting the application of the *Graham* rule, and in fact, Judge John did not even provide any explanation as to why the rule did not apply. As Dr. Bauerle argues, the original tortfeasor, i.e., the at-fault driver who caused the motor vehicle accident that necessitated Randall Green's hospitalization and the medical care rendered by Dr. Bauerle and others, was legally liable in tort for the very "same injuries" on which the jury returned its verdict, specifically the injuries resulting from the malpractice found by the jury. The settlements paid by the at-fault driver extinguished all tort liability for that original tortfeasor and thus settled claims for at least some of those same injuries.

The Greens offer a number of arguments in their attempt to refute the clear impact and governance of *Graham* on this issue. Each of those arguments is unavailing.

First, the Greens argue that the facts of the present case do not satisfy the elements of *Graham*. For instance, *Graham* requires that the injured party must use ordinary care in selecting the physician, and the Greens argue that they did not personally select Dr. Bauerle as the treating orthopaedist. Instead, Dr. Bauerle was on call at Grand Strand Regional Medical Center. The point of this aspect of the *Graham* rule is to ensure that the treating physician who commits the malpractice

is competent and skilled in the care undertaken. In other words, if Dr. Bauerle is not competent and should not have been selected as a treating physician, the original tortfeasor should not be held liable for any ensuing malpractice. Here, the record shows that Dr. Bauerle was competent and an appropriate physician to treat the fracture/dislocation of Mr. Green's right hip. Indeed, the Greens' own orthopaedic expert confirmed that Dr. Bauerle was "an excellent orthopaedic surgeon." (R. 213).

Next, the Greens argue that Dr. Bauerle did not cause an "aggravation" of the injuries with which Randall Green presented at the ER. Instead, they claim the malpractice found by the jury caused "distinct injuries to entirely different body systems." *See*, Greens' Return, p. 13. Yet, the term "aggravation of the injury" includes a worsening of the original injuries. In other words, *Graham* provides that the original tortfeasor is liable for any worsening of the plaintiff's medical condition resulting from the malpractice. That understanding is supported by this Court's decision in *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582 (1994). In that case, the plaintiff suffered neck and back injuries in a motor vehicle accident. As part of her treatment, the plaintiff was treated by a chiropractor "who performed adjustments to her whole body" which resulted in an ankle injury. 450 S.E.2d at 448. The plaintiff took the position that the at-fault driver was responsible for the ankle injury and sought PIP payments for the

medical care related to the ankle injury. On appeal, this Court found that "[t]he trial judge properly charge the *Graham* causation language," and the Court's opinion includes the exact same language from *Graham* relied upon by Dr. Bauerle. 450 S.E.2d at 450. This Court further ruled that "State Farm's obligation to pay PIP benefits for any medical expenses 'arising from' the accident would, therefore, include those caused by inappropriate or negligent treatment which aggravated the original injury so long as [plaintiff] used ordinary care in selecting the health care provider." 450 S.E.2d at 450-451. This Court thus concluded that the ankle injury could constitute an aggravation of the original back and neck injuries. Similarly, in the case at bar, the spinal paralysis resulting from the blood loss caused by the original injuries certainly constitutes an aggravation of the original injuries. By way of illustration, if Mr. Green had sustained a sufficient blood loss from the forearm laceration and from the fractured hip at the scene of the accident and before receiving medical care, which then caused cardiac arrest that resulted in spinal paralysis, the Greens would not be arguing that the paralysis was not an aggravation of the forearm laceration or the fractured hip. The spinal paralysis is precisely the type of aggravation of the original injuries that the *Graham* rule addresses.

Further, the Greens suggest that Dr. Bauerle was on board to treat Mr. Green's hip injury and that the blood loss that triggered the cardiac arrest resulted

from the forearm laceration that Dr. Bauerle was not personally treating. However, the *Graham* rule does not apply only if the aggravation results from the injury to be treated by the very practitioner who commits the malpractice. Not surprisingly, the Greens do not cite any authority for this stilted reading of *Graham*. Nonetheless, Dr. Matza testified: "There were two sources of bleeding in this case. One was the acetabular fracture and the second one was from the arm." (R. 211). Dr. Matza, in fact, estimated that "[y]ou can get two, three units of blood from a fracture/dislocation." (R. 212). Thus, the Greens' own expert offered testimony that the blood loss from the hip, i.e. the original injury actually treated by Dr. Bauerle, contributed to the cardiac arrest that resulted in the spinal paralysis. Nonetheless, it makes no difference whether the bleeding came from the hip or from the forearm. What is critical is that the bleeding came from the original injuries sustained in the motor vehicle accident, and thus, the at-fault driver is liable for the spinal paralysis that resulted from the medical negligence.

Next, the Greens argue that Dr. Bauerle has not shown that the at-fault driver's negligence proximately caused the spinal paralysis. The Greens offer a convoluted argument that quite frankly fails to take into consideration that the rule in *Graham* actually provides *as a matter of law* that "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44.

Proximate cause requires evidence of causation in fact and legal cause. *McKnight v. South Carolina Department of Corrections*, 385 S.C. 380, 684 S.E.2d 566, 569 (Ct. App. 2009). "Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence, while legal cause is proved by establishing foreseeability." *Id.* "[L]egal cause is proved by establishing foreseeability." *Id.* "The court looks to the natural and probable consequences of the complained of act to determine foreseeability." *Id.*

In the case at bar, both causation in fact and legal cause have been shown. As discussed above and in Dr. Bauerle's petition, the spinal paralysis was caused by the loss of blood that resulted in cardiac arrest. The loss of blood was a direct result of the injuries sustained by Mr. Green in the motor vehicle accident. The record demonstrates that Mr. Green presented at the ER with "a severe laceration to his right forearm that was bleeding profusely." (R. 34-35). Dr. Matza testified that Mr. Green had lost "a sizeable amount of blood" from the right forearm laceration and from the fractured hip. (R. 198, 211-212). That loss of blood "was the cause, the direct cause for [Mr. Green's] decompensation, crashing, arresting and the need to be resuscitated." (R. 198). Further, Dr. Matza opined as follows:

> [T]he delay of treatment of the bleeding which led to the arrest, which led to a zero blood pressure for a period of time, at least a half hour to 40 minutes, led to decreased blood flow or no blood flow to the arteries in the spine and it is through the lack of blood supply to the spine that the ultimate injury to the spine occurred between the mid

> thoracic region of T6 to T12, somewhere in that area where the artery resides and directly led to the paraplegia or the paralysis of both Mr. Green's lower extremities.

(R. 201). Therefore, but for the excessive bleeding sustained in the accident, which was the at-fault driver's fault, the spinal paralysis would never have occurred. Causation in fact is thus established.

Legal cause is likewise proven by the rule in *Graham*. The Supreme Court held in *Graham* that "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44. Thus, foreseeability is established.

The Greens, nonetheless, make a convoluted argument that the medical malpractice by Dr. Bauerle is an intervening act that breaks the causal chain. The Greens are mistaken. "The test for whether a subsequent negligent act by a third party breaks the chain of causation to insulate a prior tortfeasor from liability is whether the subsequent actor's negligence was reasonably foreseeable." *Keeter v. Alpine Towers International, Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). In other words, "[f]or an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *McKnight*, 684 S.E.2d at 569. Based on *Graham*, "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44. Thus, as *Graham* holds, there is no unforeseeable negligent act. The malpractice of Dr. Bauerle, as determined by the jury, was reasonably foreseeable as a matter of law.

Thus, the Greens' argument that the negligence of Dr. Bauerle was unforeseeable and broke the causal chain simply disregards the *Graham* rule in its entirety and should be soundly rejected.

In sum, the Greens' theory of liability makes the paralysis and consequential damages, including Mrs. Green's loss of consortium, a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident. The rule of law as described in *Graham* and later cases applies here. Without question, South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Ann Green's loss of consortium.

II. The trial court erred in denying a set-off even in part to Dr. Bauerle for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims.

The Greens also argue that the trial court could not conclude that the settlements paid by the at-fault driver were for the "same injuries" as the jury's verdict against Dr. Bauerle because the settlement with the at-fault driver is not in the record. However, the settlement documents are not necessary for this analysis. The settlement by the at-fault driver fully resolved all of his potential liability. The Greens have admitted that in their filings in the lower court and cannot now be heard to argue there is an absence of proof, particularly when they controlled that

proof, not Dr. Bauerle who was not a party to that settlement. In the lower court, the Greens represented to the court that "[t]he Plaintiffs eventually settled with all of the parties except Bauerle, *thereby releasing the settling parties from liability.*" (R. 50). (Emphasis added). There is no statement to the court that only *partial* liability was resolved. The Greens are being disingenuous in even remotely suggesting that all liability was not fully extinguished by the settlement. Without question, the settlement resolved ***all liability*** of the at-fault driver, and of course, that includes, based on the rule in *Graham*, the "same injuries" as were compensated by the jury verdict against Dr. Bauerle.[1]

The Greens nonetheless insist that the at-fault driver was liable for different injuries. Arguably, the at-fault driver would be liable for the original injuries, including the right forearm laceration and the fracture/dislocation of the right hip, both of which Dr. Bauerle was not liable for. However, there were substantial other injuries that both the at-fault driver and Dr. Bauerle were both liable for in

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[1] The Greens also appear to suggest that the causes of action differed. Although settled prior to the commencement of a lawsuit, the claim against the at-fault driver would obviously sound in negligence, and so did the claim against Dr. Bauerle. At any rate, the existence of the same or different causes of action is immaterial. This point is well illustrated by the recent case of *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). In that case, the plaintiff had asserted causes of action for civil conspiracy, conversion, slander and negligence against the settling party (CitiStreet) and causes of action for civil conspiracy, conversion, slander and fraud against the non-settling defendants who later sought a statutory set-off. Despite the non-overlap of causes of action in part, the Court in *Smith* found that "the injury [plaintiff] alleged she suffered as a result of tortious conduct of all defendants was the same" and as a result "the trial court was required to grant the request for a set-off [under Section 15-38-50]." 724 S.E.2d at 190.

tort – the spinal paralysis, the consequential damages therefrom, and the loss of consortium.

Importantly, the case law governing set-offs do not require that *all* of the injuries must be the same. In fact, this Court has previously explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that *part* of the amount of damages sustained which has already been paid him." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975). (Emphasis added). This Court used the words "that part" and not the word "all." Here, Dr. Bauerle has clearly shown that the "same injuries," at least in part, were settled by the at-fault driver and were also compensated by the jury's verdict. Hence, there is a "second recovery" which is not permitted.

In short, Judge John erred in concluding that the proceeds paid in settlement of the motor vehicle negligence and loss of consortium claims were for a "different injury." That was clearly incorrect given the application of the rule in *Graham*. Likewise, Judge John should not have simply denied the set-off in toto for the amounts paid by the at-fault driver. Instead, at the very least, Judge John should have engaged in an equitable allocation process. The failure to engage in that process was reversible error and subject to a remand.

In *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), the Court of Appeals explained that a trial court

possesses "jurisdiction to set off one judgment against another [which] is equitable in nature and should be exercised when necessary to provide justice between the parties." 528 S.E.2d at 688. The trial court should use its equitable powers "to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him." *Id.* Again, the Court in *Smalls* focused on "that part of the amount of damages" and did not rule a trial court may only apply a set-off where "all of the amount of damages" are the same.

In sum, Dr. Bauerle has shown that, in accordance with the rule in *Graham*, the at-fault driver was "liable in tort for the same injury" which required that the trial court apply a set-off. Even where all of the injuries may not be the same, that does not make a set-off unavailable and allow a party to receive a double recovery. In that instance, the trial court is required to exercise its equitable authority and to determine a fair and just apportionment of the settlement amounts to allow a set-off for the "same injury." Here, Judge John should have, at the very least, made an equitable determination of what portion of the settlement proceeds paid by the at-fault driver were paid for the spinal paralysis and the resulting loss of consortium, and he should have allowed a set-off in those amounts. Clearly, the loss of consortium is related to the spinal paralysis; there is no evidence that the loss of consortium damages as claimed by Ann Green resulted from the original injuries.

And as for Randall Green, the vast majority of the settlement amounts were paid for the most severe of the injuries, that being the spinal paralysis and the resulting damages therefrom.

CONCLUSION

Based on the foregoing discussion, Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully renews their request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., does hereby certify that service of the **Petitioners-Respondents' Reply In Support of Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 16th day of June 2016:

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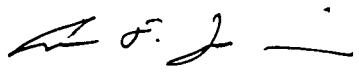

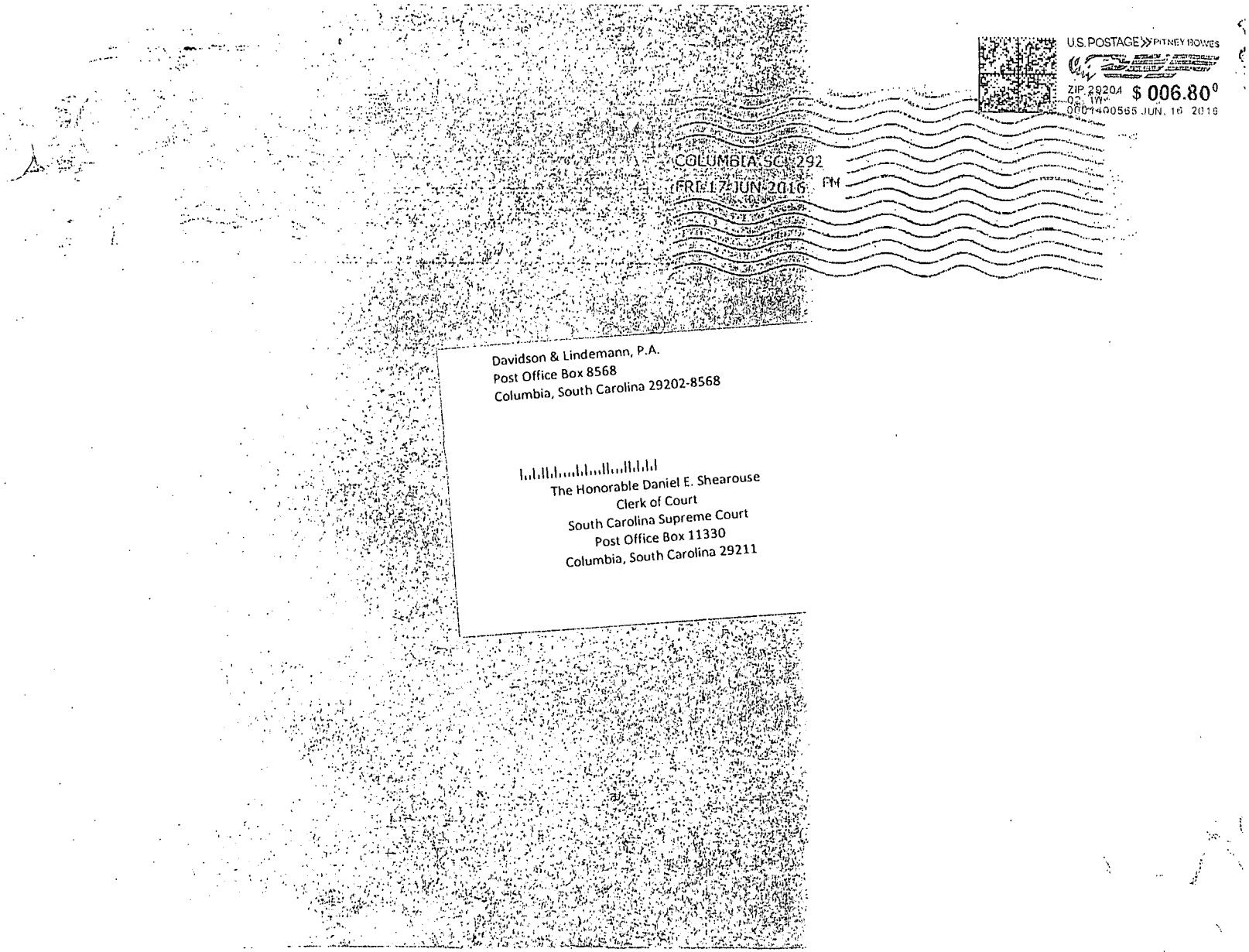
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